

(ii) The subsidiary shall be held out as a separate and distinct entity from the bank in its written material and direct contact with outside parties. All written marketing material shall clearly state that the subsidiary is a separate entity from the bank and the obligations of the subsidiary are not obligations of the bank;

(iii) The subsidiary's name shall not be the same name as its parent bank, and a subsidiary that has a name similar to its parent bank shall take appropriate steps to minimize the risk of customer confusion, including with respect to the separate character of the two entities and the extent to which their respective obligations are insured or not insured by the Federal Deposit Insurance Corporation;

(iv) The subsidiary shall be adequately capitalized according to relevant industry measures and shall maintain capital adequate to support its activities and to cover reasonably expected expenses and losses;

(v) The subsidiary shall maintain separate accounting and corporate records;

(vi) The subsidiary shall conduct its operations pursuant to independent policies and procedures that are also intended to inform customers that the subsidiary is an organization separate from the bank;

(vii) Contracts between the subsidiary and the bank for any services shall be on terms and conditions substantially comparable to those available to or from independent entities;

(viii) The subsidiary shall observe appropriate separate corporate formalities, such as separate board of directors' meetings;

(ix) The subsidiary shall maintain a board of directors at least one-third of whom shall not be directors of the bank and shall have relevant expertise capable of overseeing the subsidiary's activities; and

(x) The subsidiary and the parent bank shall have internal controls appropriate to manage the financial and operational risks associated with the subsidiary.

(3) *Supervisory requirements.* When the subsidiary will conduct an activity described in this paragraph (f) as prin-

cipal, the following additional requirements apply:

(i) The bank's capital and total assets shall each be reduced by an amount equal to the bank's equity investment in the subsidiary (for purposes of risk-based capital this deduction shall be made equally from Tier 1 and Tier 2 capital), and the subsidiary's assets and liabilities shall not be consolidated with those of the bank. The OCC may, however, require the bank to calculate its capital on a consolidated basis for purposes of determining whether the bank is adequately capitalized under 12 CFR part 6;

(ii) The standards of sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1) shall apply to, and shall be enforced and applied by the OCC with respect to, transactions between the bank and the subsidiary; and

(iii) The bank must qualify as an eligible bank under the criteria set forth at § 5.3(g), both prior to commencement of the activity, and thereafter, taking into account the capital deduction required by paragraph (f)(3)(i) of this section. If the bank ceases to be well capitalized for two consecutive quarters, it shall submit to the OCC, within the period specified by the OCC, an acceptable plan to become well capitalized.

#### § 5.35 Bank service companies.

(a) *Authority.* 12 U.S.C. 93a and 1861-1867.

(b) *Licensing requirements.* Except where otherwise provided, a national bank shall submit a notice and obtain prior OCC approval to invest in the equity of a bank service company or to perform new activities in an existing bank service company.

(c) *Scope.* This section describes the procedures and requirements regarding OCC review and approval of a notice to invest in a bank service company.

(d) *Definitions*—(1) *Bank service company* means a corporation or limited liability company organized to provide services authorized by the Bank Service Company Act, 12 U.S.C. 1861 *et seq.*, all of whose capital stock is owned by one or more insured banks in the case of a corporation, or all of the members of which are one or more insured banks

in the case of a limited liability company.

(2) *Limited liability company* means any non-corporate company, partnership, trust, or similar business entity organized under the law of a State (as defined in section 3 of the Federal Deposit Insurance Act) which provides that a member or manager of such company is not personally liable for a debt, obligation, or liability of the company solely by reason of being, or acting as, a member or manager of such company.

(3) *Depository institution*, for purposes of this section, means an insured bank, a financial institution subject to examination by the Office of Thrift Supervision, or the National Credit Union Administration Board, or a financial institution whose accounts or deposits are insured or guaranteed under state law and eligible to be insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board.

(4) *Invest* includes making any advance of funds to a bank service company, whether by the purchase of stock, the making of a loan, or otherwise, except a payment for rent earned, goods sold and delivered, or services rendered before the payment was made.

(5) *Principal investor* means the insured bank that has the largest amount invested in the equity of a bank service company. In any case where two or more insured banks have equal amounts invested, the bank service company shall designate one of the banks as its principal investor.

(e) *Standards and requirements.* A national bank may invest in the equity of a bank service company that conducts, or through an existing bank service company may conduct, activities described in paragraphs (f)(4) and (f)(5) of this section, and activities (other than taking deposits) permissible for the national bank and other state and national bank shareholders or members in the bank service company.

(f) *Procedures*—(1) *OCC notice and approval required.* Except as provided in paragraphs (f)(2) and (f)(5) of this section, a national bank that intends to make an investment in the equity of a bank service company, or to perform new activities in an existing bank serv-

ice company, shall submit a notice to and receive prior approval from the OCC. The OCC approves or denies a proposed investment within 60 days after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing presents a significant supervisory or compliance concern, or raises a significant legal or policy issue. The notice must include the information required by paragraph (g) of this section.

(2) *Notice process only for certain activities.* A national bank that is “adequately capitalized” or “well capitalized,” as defined in 12 CFR part 6, and has not been notified that it is in “troubled condition,” as defined in § 5.51, may invest in the equity of a bank service company, or perform a new activity in an existing bank service company, by providing the appropriate district office written notice within ten days after the investment, provided that the bank service company engages only in the activities listed in § 5.34(e)(2)(ii). No prior OCC approval is required. The written notice must include a complete description of the bank’s investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. Any bank receiving approval under paragraph (f)(2) of this section is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with the published OCC guidance.

(3) *Expedited review.* Notwithstanding paragraph (f)(1) of this section, a notice by an eligible bank that seeks to make an investment in the equity of a bank service company, or to perform a new activity in an existing bank service company, is deemed approved by the OCC 30 days after the filing is received by the OCC, provided that the bank service company will engage in an activity listed in § 5.34(e)(3)(ii), unless the OCC notifies the bank prior to that date that the filing is not eligible for expedited review under § 5.13(a)(2). The written notice must include a complete description of the bank’s investment in the subsidiary and of the activity to be

conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance regarding the activity. Approval under this paragraph (f)(3) is subject to the condition that the bank service company conduct the activity in a manner consistent with OCC policies contained in guidance issued by the OCC regarding the activity. The OCC also may impose additional conditions in connection with any approval under this section.

(4) *Investments requiring no approval.* A national bank does not need OCC approval to invest in a bank service company, or to perform a new activity in an existing bank service company, if the bank service company will provide the following services only for depository institutions: check and deposit posting and sorting; computation and posting of interest and other credits and charges; preparation and mailing of checks, statements, notices, and similar items; or any other clerical, bookkeeping, accounting, statistical, or similar function.

(5) *Federal Reserve approval.* A national bank also may, with the approval of the Board of Governors of the Federal Reserve System (Federal Reserve Board), invest in the equity of a bank service company that provides any other service (except deposit taking) that the Federal Reserve Board has determined, by regulation, to be permissible for a bank holding company under 12 U.S.C. 1843(c)(8).

(6) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to a request for approval to invest in a bank service corporation. However, if the OCC concludes that an application presents significant and novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

(g) *Required information.* A notice required under paragraph (f)(1), of this section must contain the following:

(1) The name and location of the bank service company;

(2) A complete description of the activities the bank service company will conduct;

(3) Information demonstrating that the bank will comply with the invest-

ment limitations of paragraph (h) of this section;

(4) Information demonstrating that the bank service company and all banks investing in the bank service company are located in the same state, unless the Federal Reserve Board has approved an exception to this requirement under the authority of 12 U.S.C. 1864(b); and

(5) Information demonstrating that the bank service company will conduct these activities only at locations in a state where the investing bank could be authorized to perform the activities directly.

(h) *Examination and supervision.* Each bank service company in which a national bank is the principal investor is subject to examination and supervision by the OCC in the same manner and to the same extent as that national bank.

(i) *Investment and other limitations—(1) Investment limitations.* A bank may not invest more than ten percent of its capital and surplus in a bank service company. In addition, the bank's total investments in all bank service companies may not exceed five percent of the bank's total assets.

(2) *Other limitations.* Except as provided in paragraph (f)(5) of this section, a bank service company shall only conduct activities that the national bank could conduct directly. If the bank service company has both national and state bank shareholders or members, the activities conducted must also be permissible for the state bank shareholders or members.

#### § 5.36 Other equity investments.

(a) *Authority.* 12 U.S.C. 1 *et seq.*, 24(Seventh), and 93a.

(b) *Scope.* National banks are permitted to make various types of equity investments pursuant to 12 U.S.C. 24(Seventh) and other statutes. These investments are in addition to those subject to §§ 5.34, 5.35, and 5.37. This section describes the procedure governing the filing of the notice that the OCC requires in connection with certain of these investments. Other investments authorized under this section may be reviewed on a case-by-case basis by the OCC.

(c) *Procedure.* (1) A national bank must provide the appropriate district